



June 19, 2020

REQUEST FOR PUBLICATION OF EMERGENCY RULES

MEMORANDUM FOR THE EXECUTIVE COMMISSIONER

THROUGH: Karen Ray  
Chief Counsel

Trey Wood  
Chief Financial Officer

FROM: Victoria Grady  
Director of Rate Analysis

SUBJECT: HHSC-20-0046 – Emergency Rule for Emergency Temporary  
Reimbursement Rate Increases and Limitations on Use of Emergency  
Temporary Funds for Medicaid in Response to Novel Coronavirus  
(COVID-19)

**Purpose**

To request your approval, as soon as possible, to adopt a new emergency rule in Texas Administrative Code, Title 1, Chapter 355, Reimbursement Rates. Upon filing this new rule with the *Texas Register*, the new rule will become effective immediately.

**Background/Summary**

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020, proclamation, and subsequent proclamations, certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses continue providing essential services. To that end, the Commission has identified certain provider types that provide critical and necessary care for Medicaid clients who may be at higher risk of severe illness from COVID-19 due to serious underlying medical conditions. Reimbursement rates should be immediately increased to ensure that these providers are able to purchase personal

protective equipment, ensure adequate staff-to-client ratios, and take other necessary steps to serve clients individually rather than in congregate settings to protect the health and safety of the clients in their care. Accordingly, the Commission finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this emergency rule for emergency temporary reimbursement rate increases and limitations on use of emergency temporary funds for Medicaid in response to novel coronavirus (COVID-19).

### **Discussion**

To protect Medicaid clients, providers, and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to give HHSC the ability to establish emergency temporary reimbursement rate increases and limitations for certain Medicaid providers that serve vulnerable populations.

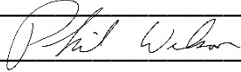
HHSC may currently implement reimbursement rate modifications in accordance with §355.201(c)(3), which allows HHSC to establish fees, rates, and charges for medical assistance in accordance with various criteria, including "...economic conditions that, in HHSC's determination, substantially and materially affect provider participation." In addition to potential reimbursement rate modifications that HHSC may implement pursuant to §355.201(c)(3), HHSC is adopting this emergency rule to establish an emergency temporary reimbursement methodology to issue rate increases to providers in response to the COVID-19 pandemic. HHSC is prohibiting providers from using the increased reimbursement rates to increase hourly wages paid to direct care staff on an ongoing basis; use of the funds for staff compensation is limited to overtime payments, lump sum bonuses, bonuses for hazard pay, or other types of compensation that will not result in future reductions to hourly wages when the emergency temporary reimbursement rate increase is discontinued.

The emergency rulemaking is adopted pursuant to Texas Government Code §2001.034, which authorizes the adoption of emergency rules without prior notice and hearing if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice.

Karen Ray, HHSC Chief Counsel, has reviewed the new rule and determined that the rule meets all legal requirements for publication.

**Recommendation**

I recommend that you approve the new emergency rule for adoption as soon as possible. The preamble and new rule that will be submitted to the *Texas Register* are attached for your review.

<b><u>Executive Commissioner's Decision</u></b>			
Approved	<u>    X    </u>	Date	<u>  06-19-2020  </u>
Not Approved	<u>          </u>	Date	<u>          </u>
Modify	<u>          </u>	Schedule Briefing	<u>          </u>
Comments/Acknowledgment:			
			

Attachment:      Emergency Adoption Preamble and Emergency Rule Text

cc: Vacant, Chief of Staff

TITLE 1                   ADMINISTRATION  
PART 15                 TEXAS HEALTH AND HUMAN SERVICES COMMISSION  
CHAPTER 355         REIMBURSEMENT RATES  
SUBCHAPTER B        ESTABLISHMENT AND ADJUSTMENT OF REIMBURSEMENT  
                          RATES FOR MEDICAID

EMERGENCY RULE ADOPTION PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 1 Texas Administrative Code, Chapter 355, Reimbursement Rates, new §355.205, concerning an emergency rule for emergency temporary reimbursement rate increases and limitations on use of emergency temporary funds for Medicaid in response to novel coronavirus (COVID-19). As authorized by Texas Government Code §2001.034, HHSC may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020 proclamation, and subsequent proclamations, certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses continue providing essential services. To that end, HHSC has identified certain provider types that provide critical and necessary care for Medicaid clients who may be at higher risk of severe illness from COVID-19 due to serious underlying medical conditions. Reimbursement rates should be immediately increased to ensure that these providers are able to purchase personal protective equipment, ensure adequate staff-to-client ratios, and take other necessary steps to serve clients individually rather than in congregate settings to protect the health and safety of the clients in their care. Accordingly, HHSC finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this emergency rule for emergency temporary reimbursement rate increases and limitations on use of emergency temporary funds for Medicaid in response to novel coronavirus (COVID-19).

To protect Medicaid clients, providers, and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to give HHSC the ability to establish emergency temporary reimbursement rate increases and limitations for certain Medicaid providers that serve vulnerable populations. HHSC may currently implement reimbursement rate modifications in accordance with §355.201(c)(3), which allows HHSC to establish fees, rates, and charges for medical assistance in accordance with various criteria, including

"...economic conditions that, in HHSC's determination, substantially and materially affect provider participation." In addition to potential reimbursement rate modifications that HHSC may implement pursuant to §355.201(c)(3), HHSC is adopting this emergency rule to establish an emergency temporary reimbursement methodology to issue rate increases to providers in response to the COVID-19 pandemic. HHSC sought and received approval for this increase as required by House Bill 1 (Article II, Special Provisions for Health and Human Services Agencies, Special Provision 14), 86th Texas Legislature, Regular Session, 2019, and was directed to restrict use of funds by providers. HHSC is adopting this emergency rule to describe the process by which HHSC will restrict providers from using the increased reimbursement rates to increase hourly wages paid to direct care staff on an ongoing basis; use of the funds for staff compensation is limited to overtime payments, lump sum bonuses, bonuses for hazard pay, or other types of compensation that will not result in future reductions to hourly wages when the emergency temporary reimbursement rate increase is discontinued, in accordance with the contingencies placed upon use of the funds.

#### STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §2001.034 and §531.0055, Texas Government Code §531.033, Texas Human Resources Code §32.021, and Texas Government Code §531.021(a) and §531.021(b-1). Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Government Code §531.033 authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties. Texas Human Resources Code §32.021 and Texas Government Code §531.021(a) provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas. Finally, Texas Government Code §531.021(b-1) establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for Medicaid payments under the Texas Human Resources Code, Chapter 32.

The new section implements Texas Government Code §531.0055, Texas Government Code Chapter 531, and Texas Human Resources Code Chapter 32.

The agency hereby certifies that the emergency rulemaking has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

#### ADDITIONAL INFORMATION

For further information, please call: (512) 517-0435 or (512) 431-7028.

TITLE 1                   ADMINISTRATION  
PART 15                 TEXAS HEALTH AND HUMAN SERVICES COMMISSION  
CHAPTER 355         REIMBURSEMENT RATES  
SUBCHAPTER B        ESTABLISHMENT AND ADJUSTMENT OF REIMBURSEMENT  
                              RATES FOR MEDICAID

§355.205. Emergency Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19).

(a) Introduction. The Texas Health and Human Services Commission (HHSC) uses the methodology described in this section to establish emergency temporary reimbursement rate increases while limiting use of the funds received by the provider through the increases. This section also describes the circumstances in which recoupments will be necessary for certain provider types or services during the COVID-19 federal public health emergency period. Provider types and services that are eligible for increased reimbursement rates under this section include:

(1) all provider types and services for which a reimbursement rate methodology is described in this chapter; and

(2) any other provider or service that is established in response to COVID-19.

(b) Eligibility. To receive and retain emergency temporary reimbursement rate increases from HHSC under this section:

(1) the provider must be enrolled as a Medicaid provider with HHSC;

(2) the provider must be actively providing and billing for services provided to fee-for-service Medicaid clients;

(3) the provider must agree not to increase hourly wages paid to direct care staff on an ongoing basis, and to limit use of the funds to overtime payments, lump sum bonuses, bonuses for hazard pay, or other types of compensation that will not result in future reductions to hourly wages when the emergency temporary reimbursement rate increase is discontinued; and

(4) HHSC must receive approval from Centers for Medicare & Medicaid Services (CMS) for the provider type or specific service to be reimbursed through this section.

(c) Attestation of agreement. The provider must submit an electronic attestation of agreement to comply with subsection (b)(3) of this section either within 90 days of the effective date of the reimbursement rate increase, or by September 30, 2020, whichever date is later.

(d) Reconciliation process. HHSC uses the methodology in this subsection to recoup the temporary emergency payments made under this section if a provider fails to submit the attestation of agreement under subsection (c) of this section.

(1) HHSC will reduce reimbursement rates for any claim for services to the amount that would have been paid to the provider absent the emergency temporary reimbursement rate increase.

(2) The provider's claims will be reprocessed at the lower reimbursement rate under paragraph (1) of this subsection and an accounts receivable will be established.

(3) The provider will be paid on a normal per claim basis after the equivalent amount of the account receivable has been collected by HHSC, or its designee.

(4) After 270 days from the date of the establishment of the account receivable under paragraph (1) of this subsection, HHSC will recoup any overpayments owed under paragraph (1) of this subsection by demanding immediate repayment of any outstanding amount.

(e) Overpayment.

(1) If payments under this section result in an overpayment to a provider, HHSC, or its designee, may recoup an amount equivalent to the overpayment.

(2) Payments made under this section may be subject to any adjustments for payments made in error or due to fraud, including, without limitation, adjustments made under the Texas Administrative Code, the Code of Federal Regulations, and state and federal statutes. HHSC, or its designee, may recoup an amount equal to any such adjustments from the providers in question. This section may not be construed to limit the independent authority of another federal or state agency or organization to recover from the provider for a payment made due to fraud.

(f) Disallowance of federal funds. If payments under this section are disallowed by CMS, HHSC may recoup the amount of the disallowance from providers that participated in the program associated with the disallowance. If the recoupment from a provider for such a disallowance results in a subsequent disallowance, HHSC will recoup the amount of that subsequent disallowance from the same entity.

(g) Termination of emergency temporary rate increases. HHSC will terminate the emergency temporary rate increases at the earlier of either the termination of the federally declared public health emergency, including any extensions, or at the time that HHSC determines rate increases are no longer necessary pursuant to § 355.201(c)(3). However, HHSC will continue to enforce the reconciliation and recoupment processes described in subsections (d), (e), and (f) of this section after the termination of the temporary emergency rate increases.